

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

In the Matter of:

**DETERMINATION OF RATES AND
TERMS FOR DIGITAL PERFORMANCE
OF SOUND RECORDINGS AND MAKING
OF EPHEMERAL COPIES TO
FACILITATE PERFORMANCES (*WEB V*)**

**Docket No. 19-CRB-0005-WR
(2021-2025)**

**WRITTEN REBUTTAL STATEMENT OF THE NATIONAL
RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC LICENSE
COMMITTEE, INCLUDING EDUCATIONAL MEDIA FOUNDATION**

VOLUME 1 OF 1

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Noncommercial Music License Committee*

January 14, 2020

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REBUTTAL STATEMENT OF THE NATIONAL RELIGIOUS
BROADCASTERS NONCOMMERCIAL MUSIC LICENSE
COMMITTEE, INCLUDING EDUCATIONAL MEDIA FOUNDATION**

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TAB A

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

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Docket No. 19-CRB-0005-WR
(2021-2025)

**INTRODUCTORY MEMORANDUM TO THE WRITTEN REBUTTAL STATEMENT
OF THE NATIONAL RELIGIOUS BROADCASTERS NONCOMMERCIAL MUSIC
LICENSE COMMITTEE, INCLUDING EDUCATIONAL MEDIA FOUNDATION**

For the convenience of the Copyright Royalty Judges (“Judges”), the National Religious Broadcasters Noncommercial Music License Committee, including Educational Media Foundation (“NRBNMLC”), respectfully submits this Introductory Memorandum, which summarizes the rebuttal testimony of the NRBNMLC in this proceeding.

SoundExchange Inc. (“SoundExchange”) argues in its written direct statement that noncommercial entities should be required to pay rates for the 17 U.S.C. §§ 112 and 114 statutory webcasting licenses under a structure that assesses a \$1,000 fee (doubled from the current \$500 fee) for webcasting of up to 159,140 monthly aggregate tuning hours (“ATH”) and per-performance rates for additional webcasting at commercial webcaster per-performance rates, which it proposes to increase sharply. The NRBNMLC’s written rebuttal statement refutes both elements of this fee proposal through the testimony of expert witness **Richard Steinberg**, who is a Professor of Economics, Philanthropic Studies and Public Affairs, Indiana University–Purdue University Indianapolis.

Professor Steinberg previously presented Written Direct Testimony establishing that the right to perform sound recordings in webcast transmissions by commercial entities and the right to perform sound recordings in webcast transmissions by noncommercial entities constitute different segments of the market for sound recording performance rights. He also testified that these markets remain distinct regardless of listenership levels or size of the respective types of webcasters, and he refutes concerns regarding potential cannibalization between the respective markets. In addition, Professor Steinberg discussed several marketplace and other factors that support charging noncommercial webcasters lower rates under the 17 U.S.C. §§ 112 and 114 statutory licenses than those charged to commercial entities, including agreements that SoundExchange recently reached with (a) College Broadcasters, Inc. and (b) National Public Radio and the Corporation for Public Broadcasting (collectively “NPR”) for the 2021-2025 license term. He also presented testimony regarding the characteristics of reasonable potential royalty structures for noncommercial webcasters, which are consistent with the rate proposal submitted by the NRBNMLC proposing tiered flat fees of \$500 for each 159,140 monthly ATH streamed by a noncommercial webcaster (calculated on an annual basis).

In his Written Rebuttal Testimony, Professor Steinberg refutes the proposal and related witness testimony submitted by SoundExchange and aligned parties that seeks to charge the same per-performance rates that apply to commercial entities to webcasting by noncommercial entities that exceeds 159,140 ATH per month. He does so by discussing the characteristics and economic significance of SoundExchange’s agreement with NPR for the current 2016-2020 license term (“2016-2020 NPR Agreement”) in light of a document produced by SoundExchange that was prepared in connection with the negotiation and valuation of that agreement. Professor Steinberg testifies that the document appears to show that while negotiations with NPR were

ongoing, SoundExchange evaluated [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]. Professor Steinberg also observes that the fees that SoundExchange ultimately agreed to with NPR are [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]. He observes that the 2016-2020 NPR Agreement, viewed in light of SoundExchange's analysis, indicates that SoundExchange and record companies have been willing to accept fees from noncommercial broadcasters that [REDACTED]
[REDACTED]].

Professor Steinberg also demonstrates that SoundExchange's proposal to double the annual minimum fee from \$500 to \$1,000 is not supported by the proffered rationales of SoundExchange's witnesses supporting this proposal. Professor Steinberg testifies, *inter alia*, that SoundExchange's reliance on alleged inflation is irrelevant given SoundExchange's willingness to accept \$500 minimum fees through December 31, 2020 and, in any event, uses the wrong starting point for calculating past inflation. He also demonstrates that SoundExchange's estimate of per-channel license administration costs is grossly inflated and unreliable, as it includes all of SoundExchange's expenses – including expenses such as rate court litigation, depreciation, executive compensation, and outreach – with no attempt to identify the expenses

associated with the actual costs of collecting and distributing royalties collected pursuant to the 17 U.S.C. §§ 112 and 114 statutory licenses at issue here.

**CONTENTS OF THE NATIONAL RELIGIOUS BROADCASTERS
NONCOMMERCIAL MUSIC LICENSE COMMITTEE'S
REBUTTAL TESTIMONY**

The NRBNMLC's Written Rebuttal Statement consists of (A) this Introductory Memorandum; (B) written rebuttal testimony by Professor Richard Steinberg; and (C) the NRBNMLC's additional exhibits.

Respectfully submitted,

/s/ Karyn K. Ablin

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*Counsel for the National Religious Broadcasters
Noncommercial Music License Committee*

January 10, 2020

TAB B

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.**

In the Matter of:

**DETERMINATION OF RATES AND
TERMS FOR DIGITAL
PERFORMANCE OF SOUND
RECORDINGS AND MAKING OF
EPHEMERAL COPIES TO
FACILITATE PERFORMANCES
(WEB V)**

**Docket No. 19-CRB-0005-WR
(2021-2025)**

**WRITTEN REBUTTAL TESTIMONY OF
RICHARD STEINBERG,**

**Professor of Economics and Philanthropic Studies
The Lilly Family School of Philanthropy
on the IUPUI campus of Indiana University**

**(On behalf of the National Religious Broadcasters
Noncommercial Music License Committee)**

January 10, 2020

I. INTRODUCTION AND ROAD MAP

1. My name is Richard Steinberg. I previously submitted Written Direct Testimony in this proceeding, which I amended on December 11, 2019 (“Steinberg AWDT”). I offer this testimony to rebut assertions by witnesses for SoundExchange’s (SX) and affiliated parties that commercial usage rates should apply to webcasting in excess of 159,140 aggregate tuning hours (“ATH”) per month¹ by noncommercial educational (NCE) broadcasters.² The points made in my previous testimony still apply.³ In this rebuttal, I add to the argument by showing that the fees set in the webcasting settlement agreement between SX and NPR (collective abbreviation for National Public Radio and the Corporation for Public Broadcasting) for the current 2016-2020 license term (SX-NPR Web IV Agreement, NRBNMLC Exhibit 22) appear to be [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]. To make this point, I rely on

¹ For example, Jonathan Bender, SoundExchange’s Chief Operating Officer, stated: “For the approximately 3% of noncommercial webcasters (at the statement of account level) with usage in excess of the 159,140 ATH threshold, we propose retaining the current arrangement whereby they pay for their excess usage at the same rate as commercial nonsubscription webcasters.” Bender WDT Web V, pp. 16-17. Aaron Harrison, a Senior Vice President for UMG Recordings, Inc., similarly asserted: “UMG supports the proposal to retain an aggregate tuning hours threshold, above which noncommercial webcasters must pay commercial rates.” Written Direct Testimony of Aaron Harrison ¶80 (September 23, 2019).

² I understand that the Judges have used the term “noncommercial educational” to refer specifically to noncommercial webcasters that meet five conditions listed in 37 C.F.R. Part 380 Subpart C. These are webcasting channels affiliated with accredited post-secondary educational institutions whose operations are staffed substantially by students. In contrast, I use the term, usually abbreviated as NCE, to mean organizations defined by the Federal Communications Commission in 47 USC § 397(6). These are radio broadcast stations that are eligible to be licensed by the Commission as a noncommercial educational radio broadcast station and are owned and operated by a public agency or nonprofit private foundation, corporation, or association. Thus, in addition to stations meeting the CRB definition of the term, I include nonprofit religious and public radio stations that advance an educational purpose and follow FCC requirements to be so licensed. In turn, I refer to webcasting conducted by NCE broadcasters as NCE webcasting.

³ See §§ III(C), III(D), and IV of Steinberg AWDT.

a newly produced document from SX that analyzes [REDACTED]
[REDACTED]].⁴

2. I also rebut assertions by SX witnesses that the minimum annual license fee should be increased to \$1,000 for the years covered by the current rate proceedings (2021-2025). I show that the rationale for doing so has been exaggerated in SX witness calculations.

II. SOUND EXCHANGE AND THE RECORD COMPANIES ARE WILLING TO ACCEPT NONCOMMERCIAL FEES THAT ARE SIGNIFICANTLY LOWER THAN COMMERCIAL FEES.

3. As discussed in my AWDT, commercial rates greatly exceed those that would be negotiated with noncommercial streamers under a willing buyer/willing seller standard.⁵ And yet SoundExchange (SX) proposes to apply commercial streaming rates to streaming by NCE webcasters that exceeds a threshold of 159,140 ATH in any month. In this section, I add to my earlier testimony, using a newly acquired analysis prepared by SX [REDACTED]
[REDACTED]] (NRBNMLC Exhibit 23). I demonstrate that this analysis shows that SX has agreed, for a large group of NCE broadcasters, to a lump sum payment that would be equivalent to 2016-2020 royalty rates for webcasting [REDACTED]
[REDACTED]] when the analysis was prepared.⁶ After developing this argument, I will show that the implicit [REDACTED]

⁴ See NRBNMLC Ex. 22.

⁵ See §§ III(C), III(D), and IV of Steinberg AWDT.

⁶ The [REDACTED]
[REDACTED]
[REDACTED]].

[REDACTED]
[REDACTED]].

4. The document that supports this analysis is an Excel file produced by SX (NRBNMLC Exhibit 23) labeled “[REDACTED]”. The first sheet of that file is labeled “[REDACTED]”. The first two sections of this sheet are not directly relevant to my analysis, but for completeness and clarity, I summarize them here. The first section [REDACTED]
[REDACTED]
[REDACTED]]. Then the sheet reports “[REDACTED]
[REDACTED]”.⁷

5. The third and fourth sections of the sheet are more pertinent to my point and [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]. The third section [REDACTED]
[REDACTED]
[REDACTED]].

6. In addition to [REDACTED]
[REDACTED]
[REDACTED]]. It appears that [REDACTED]

⁷ The calculation in this section assumes that [REDACTED]
[REDACTED]].

⁸ The sheet notes that [REDACTED]].

[REDACTED] ⁹ The sheet [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ¹⁰ The final line of
the spreadsheet [REDACTED]
[REDACTED]
[REDACTED] ¹¹

7. How do these [REDACTED]
[REDACTED]? The total license fee for these years that SX ultimately agreed to accept from these
NCE webcasters is \$2,800,000, or \$560,000 per year.¹² In other words, the fees that SX
accepted in the SX-NPR Web IV Agreement are, [REDACTED]
[REDACTED]
[REDACTED] ¹² In conclusion, SX accepted fees that were

⁹ SX received census reports [REDACTED],
revealing all songs played, instead of sample play lists. [REDACTED]
[REDACTED] ¹⁰

¹⁰ Although the last line of the sheet appears in a box labeled “[REDACTED]
[REDACTED] ¹¹ That last line is [REDACTED]
[REDACTED] ¹² In support of this
conclusion, note that there is [REDACTED]
[REDACTED] ¹³

¹¹ The [REDACTED]
[REDACTED] ¹⁴

¹² This includes “all Web Site Performances by Covered Entities during the Term, up to a total Music ATH of 285,132,065 per calendar year, and Ephemeral Phonorecords ...” assuming no increase in the number of covered entities. 37 C.F.R. §380.32(a) and 37 C.F.R. §380.33.

[[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]].

8. The SX-NPR Web IV Agreement itself supports this reading. It states that the \$560,000 annual license payment reflects “(i) an annual minimum fee of \$500 for each Covered Entity for each year during the Term; (ii) additional usage fees for certain Covered Entities; and (iii) a discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.”¹³ NRBNMLC Exhibit 23 provides [[REDACTED]].

9. The most plausible explanation is that SX recognizes that [[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]]. We do not know what SX believed [[REDACTED]],
but if it believed [[REDACTED]
[REDACTED]
[REDACTED]].

10. I was not provided with [[REDACTED]
[REDACTED]], but the numbers in that agreement are consistent with this interpretation. The total

¹³ 37 C.F.R. 380 (D) §380.32(b)

license fee of \$560,000 per year in the SX-NPR Web IV Agreement covered up to a total music ATH of 285,132,065, which, by simple division, amounts to \$0.0020 per music ATH. The proposed Web V agreement has a total annual license fee of \$800,000 for a music ATH that grows each year but averages 380,000,000. Simple division yields a charge of \$0.0021 per music ATH. It would be better if [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]].

II. SOUND EXCHANGE MAKES AN INSUFFICIENT CASE FOR INCREASING THE MINIMUM FEE TO \$1,000.

11. SoundExchange has proposed to double the annual minimum fee applicable to NCE and other webcasters from \$500 to \$1,000 per channel or station.¹⁴ The rationale for doing so is explained by two SX witnesses. After summarizing their arguments, I will show that their arguments do not suffice to make the case for a \$1,000 minimum fee.
12. Jonathan Bender, a witness for SoundExchange and its Chief Operating Officer, attempts to justify the increase based on four factors: inflation, increases in royalty rates, increases in the costs of administration, and increasing usage.¹⁵ He calculates a current dollar equivalent of a \$500 minimum for each of these factors but begins with the wrong base year in each case. For example, he looks at cumulative inflation since 1998 instead of the economically relevant expected inflation from the current year to 2021-2025. The period covered by Web IV is the relevant base, and the only cost increases relevant for the current proceedings are those

¹⁴ Proposed Rates and Terms of SoundExchange, Inc. and Artist and Copyright Owner Participants at 2 (Sept. 23, 2019); Written Direct Testimony of Jonathan Bender ¶ 37 (Sept. 23, 2019) (Bender WDT).

¹⁵ Bender WDT ¶ 42.

projected to occur after 2020. Despite any past increases in costs, the respective parties had proposed a \$500 fee for Web IV, so such a fee is not below what a willing buyer and seller would agree to. The Judges recognized in Web IV that a proposed \$500 fee was appropriate for 2016-2020, and if so, only future inflation could make it inappropriate for 2021-2025:

“The current \$500 minimum fee for commercial webcasters has been in force for more than a dozen years, and has been voluntarily re-adopted by licensors and licensees on two occasions. It has been proposed by licensors and licensees in this proceeding. ... The Judges find the proposed minimum fee (including the \$50,000 cap) to be reasonable and supported by record evidence, and will therefore adopt it.”¹⁶

13. Two of these factors (regarding royalty rates and increasing usage) are legally irrelevant because the Judges have ruled that the minimum fee’s primary purpose is to cover administrative costs and, less importantly, to reflect the benefit of access to a blanket license. It is not designed to cover usage.¹⁷ Mr. Bender even quotes the Judges on this matter, a most puzzling decision: “The Judges also explained that ‘[b]ecause this minimum fee of \$500 is meant to cover administrative costs, it does not address actual usage.’”¹⁸

¹⁶ *Web IV Determination*, 81 Fed. Reg. at 26397. SoundExchange itself proposed \$500 as the minimum fee through Dec. 2020 for noncommercial broadcasters represented by the NRBNMLC. *See* Final Rule and Order, 81 Fed. Reg. 26316, 26397 (May 2, 2016) (stating that the \$500 minimum fee “has been proposed by SoundExchange and the NRBNMLC”).

¹⁷ In the Web II determination, the Judges concluded:

“We also find no basis in the record for distinguishing between Commercial Webcasters and Noncommercial Webcasters with respect to the administrative cost of administering the license. Therefore, we determine that a minimum fee of an annual non-refundable, but recoupable \$500 minimum per channel or station payable in advance is reasonable over the term of this license. Because this minimum fee of \$500 is meant to cover administrative costs, it does not address actual usage. Therefore, it would be reasonable to add at least the bare minimum suggested by the Services’ proposals as payment for usage to the \$500 minimum fee for administration. However, based on the available evidence, we find that past practice has been to treat the minimum fee as recoupable against usage charges. Therefore, we have no basis upon which to add a usage element that is not recoupable to the minimum fee for this distinctive submarket of noncommercial webcasters.”

72 Fed. Reg. 24084, 24099 (May 1, 2007). Internal references omitted.

¹⁸ Bender WDT ¶ 41. Internal references omitted.

14. Using historic data, Mr. Bender asserts that “\$500 in October 1998 was equivalent to \$782.19 in August 2019.”¹⁹ Money has indeed lost that much value since 1998, but that is irrelevant. Instead, I calculate the expected future dollar equivalent of \$500 for each year covered by Web V. I used a set of the most authoritative inflation forecasts available – individual forecasts by each member of the U.S. Federal Reserve Board and each Federal Reserve Bank President prepared for the December 2019 meeting of the Federal Open Market Committee for my calculations. First, I calculated the future value of \$500 using the median forecast – where half the individuals had a lower forecast and the other half a higher forecast. The result is that \$500 in 2020 is equivalent to \$552.04 in 2025. Alternatively, I calculated future value using the highest individual forecast of inflation, and the 2025 equivalent is nearly the same at \$557.47 (see Appendix II for more details). This perhaps justifies a small increase in the minimum fee, not an increase to \$1,000.
15. Even if Mr. Bender’s backward-looking assessment were economically relevant, 1998 is not the right starting year. True, there was a \$500 minimum fee that year, but it applied to each entity rather than each channel or station. Webcasters operating multiple channels or stations for that license term would have paid a fraction of the current minimum fee.²⁰ The first \$500 minimum fee applicable to channels or stations became effective in 2003,²¹ and that is the

¹⁹ Bender WDT ¶ 43.

²⁰ See *Web I Determination*, 67 Fed. Reg. 45240, 45274 (July 8, 2002) (“Each Webcaster, Commercial Broadcaster, and Non-CPB, Non-Commercial Broadcaster licensed to make eligible digital transmissions and/or ephemeral recordings ... shall pay a minimum fee of \$500 for each calendar year”).

²¹ See *Final Rule*, 69 Fed. Reg. 5693, 698 (Feb. 6, 2004) (“Each Licensee other than a Business Establishment Service shall pay a minimum fee of \$2,500, or \$500 per channel or station (excluding archived programs, but in no event less than \$500 per Licensee), which is less, for each calendar year in which it makes eligible nonsubscription transmissions”).

appropriate starting year for invoking inflation. Historical inflation would have brought \$500 in January 2003 up to 707.78 in November 2019.²²

16. In addition, SoundExchange recently agreed to minimum annual fees with College Broadcasters, Inc. of \$550 (not \$1,000) in 2021, increasing in \$50 increments through 2025.²³ SoundExchange's own marketplace behavior does not comport with a sudden minimum fee increase to \$1,000 in 2021 for NCE webcasters but shows that it is willing to accept fees from NCE webcasters that are far less than \$1,000.
17. Mr. Bender argues next that the minimum fee is meant to include some fraction of the royalties that would be due on the first 159,140 ATH of usage. As noted above, this is legally irrelevant and in any case looks to historical increases in usage rather than expected future increases. Finally, even if the Judges accept this argument as valid in some form despite the fact that usage royalties are not recoupable against the minimum fee, they should not follow Mr. Bender's calculations because increased royalty rates are at best a small fraction of what goes into the NCE minimum fee.
18. Next, Mr. Bender argues that administrative costs have increased, and he constructs rough estimates of the current level of SX's administrative costs.²⁴ Once again, any historical increases in administrative costs have already been accepted by willing buyers and sellers without an increase in the minimum fee, and only expected future increases in administrative costs matter for these proceedings. The current level of administrative costs tells us nothing about expected future increases. His qualitative discussion of reasons for administrative cost

²² <https://data.bls.gov/cgi-bin/cpicalc.pl>.

²³ See NRBNMLC Ex. 20 at 7.

²⁴ Bender WDT ¶¶ 47-51.

increases does not distinguish between historical and expected future factors and his discussion is one-sided. There are three countervailing factors that act to reduce administrative fees over time – development of computer algorithms that allow most of the analysis to be automated with very low marginal costs, economies of scale in processing data, and decreases in the costs of storing and processing information. I do not know how large these countervailing factors are and whether they suffice to reverse expectations that administrative costs will increase during the period covered by Web V. But the case for increasing the administrative cost portion of the minimum fee has not been made by SX's witnesses.

19. In any case, Mr. Bender's rough estimates are deeply flawed because he does not distinguish between administrative costs attributable to licensing and processing fees from other administrative costs associated with running any modern corporation. To calculate these costs, he divides \$55 million in total expenses in 2018 by an estimate of the number of channels or stations paying royalties to SX (3,637 licensees times 3.4 average channels or stations per licensee), which yields a per-channel cost of \$4,448. Mr. Bender does not cite his source for the \$55 million figure but that number matches the number in the Summary Financial Data in the audited Consolidated Financial Statements, from the line labeled

[REDACTED]

[REDACTED]]].²⁵ This clearly includes things like executive compensation (regardless of the time, if any, that these executives spent on licensing matters), legal fees (including [REDACTED])

²⁵ SoundExchange, Inc. and Subsidiaries. Consolidated Financial Statements, Years Ended December 31, 2018 and 2017. We refer to data from pages 39 and 40 of this document.

[REDACTED]), depreciation [REDACTED]), and many other items unrelated to licensing and fee-processing costs. More detail is provided when SoundExchange, Inc. financial data is consolidated with the financial data from subsidiaries, including [REDACTED]), although the consolidated table does not reveal with this was attributable to the parent company or the subsidiaries. I do not have the data to comprehensively correct his estimate, and neither does Mr. Bender because, as stated above, SX does not track administrative expenses per channel or station. But the above analysis establishes that Mr. Bender's estimate of administrative costs is grossly inflated.

20. Mr. Bender also points to the 2021 annual ASCAP and BMI fees that apply to noncommercial broadcasting of musical works that range from \$746 for "the smallest college broadcasting stations" to \$1,928 for larger college broadcasters as support for SoundExchange's \$1,000 minimum fee proposal.²⁶ This is puzzling, as he states that "the use of musical work rates to set sound recording rates has otherwise been thoroughly rejected."²⁷ In addition, these fees are flat fees covering all music usage, not minimum fees supplemented by usage-based royalties. In addition, the fees are for broadcasting rights, not webcasting rights, where administrative costs may differ. Finally, although the college stations may deal with multiple entities to license a wide range of music, a single entity such as SoundExchange would be able to administer a license covering all works than would be multiple entities each separately administering licenses for separate portions of those works.

²⁶ "[T]he smallest college broadcasting stations will pay \$746 just for use of ASCAP and BMI musical works, plus more if they license musical works through SESAC and Global Music Rights. College broadcasting stations affiliated with large schools will pay \$1,928 for use of ASCAP and BMI musical works." Bender WDT ¶ 53.

²⁷ Bender WDT ¶ 53.

Adding administration costs from separate elements would result in double-counting some cost elements that could be avoided if administration were handled by a single entity.

APPENDIX I: WORKS CONSULTED

Restricted:

SOUNDEX_W5_000190242_RE NPRCPB.pdf (email chain)

SoundExchange, Inc. and Subsidiaries Consolidated Financial Statements: Years Ended December 31, 2018 and 2017 (SOUNDEX_W5_000046912-000046954)

SoundExchange [REDACTED] Document
(SOUNDEX_W5_NATIVE_PROD_002588)

Public:

Joint Motion of SoundExchange, Inc., National Public Radio, Inc., and the Corporation for Public Broadcasting To Adopt Partial Settlement, Docket No. 2014-CRB-0001-WR (2016-2020) (Feb. 23, 2015)

Joint Motion of SoundExchange, Inc., National Public Radio, Inc., and the Corporation for Public Broadcasting To Adopt Partial Settlement, Docket No. 19-CRB-0005-WR (2021-2025) (Sept. 23, 2019)

NRBNMLC Ex. 21 SX CPB NPR Settlement Motion (Web V)

APPENDIX II: CALCULATION OF EXPECTED FUTURE INFLATION AND THE RESULTING MINIMUM FEE

FRB inflation forecasts and the minimum fee.

year	median rate	future \$ equivalent	high range	future \$ equivalent
2020	1.90%	\$500.00	2.30%	\$500.00
2021	2.00%	\$510.00	2.20%	\$511.00
2022	2.00%	\$520.20	2.20%	\$522.24
2023	2.00%	\$530.60	2.20%	\$533.73
2024	2.00%	\$541.22	2.20%	\$545.47
2025	2.00%	\$552.04	2.20%	\$557.47

1) Source: <https://www.federalreserve.gov/monetarypolicy/files/fomcprojt20191211.pdf>

2) This table contains forecasts of the PCE (personal consumption expenditure price index) inflation rate from the fourth quarter of the previous year to the fourth quarter of the indicated year. The forecasts were made by individual members of the Federal Reserve Board and Federal Reserve Bank presidents under their individual assumptions of projected appropriate monetary policy for the Dec. 2019 meeting of the Federal Open Market Committee.

3) The median rate is the rate forecast by the person in the middle of the distribution of forecasts. The high range forecast is the highest inflation rate forecast by anyone.

Table prepared by Richard Steinberg 1/10/2020

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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**Docket No. 19-CRB-0005-WR
(2021-2025)**

DECLARATION OF RICHARD STEINBERG

I, Richard Steinberg, declare under penalty of perjury that the matters set forth in my Written Rebuttal Testimony in the above-captioned proceeding are true and correct to the best of my knowledge, information, and belief.

Executed on January 10, 2020.



Richard Steinberg

TAB C

INDEX OF EXHIBITS

<u>Ex. No.</u>	<u>Restricted / Public</u>	<u>Sponsored By</u>	<u>Description</u>
NRBNMLC Ex. 22	Public	Richard Steinberg	Joint Motion of SoundExchange, Inc., National Public Radio, Inc., and the Corporation for Public Broadcasting To Adopt Partial Settlement, Docket No. 2014-CRB-0001-WR (2016-2020) (Feb. 23, 2015)
NRBNMLC Ex. 23	Restricted	Richard Steinberg	SoundExchange [[REDACTED] [REDACTED]] Document (SOUNDEX_W5_NATIVE_PROD_002588)
NRBNMLC Ex. 24	Restricted	Richard Steinberg	SoundExchange, Inc. and Subsidiaries Consolidated Financial Statements: Years Ended December 31, 2018 and 2017 (SOUNDEX_W5_000046912-000046954)

NRBNMILC

Ex. 22

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.



In re

Determination of Royalty Rates and
Terms for Ephemeral Recordings and
Digital Performance of Sound Recordings
(*Web IV*)

Docket No. 2014-CRB-0001-WR
(2016-2020)

JOINT MOTION TO ADOPT PARTIAL SETTLEMENT

SoundExchange, Inc. (“SoundExchange”), National Public Radio, Inc. (“NPR”) and the Corporation for Public Broadcasting (“CPB”) (collectively the “Parties”) have reached a partial settlement of the above-captioned proceeding (the “Proceeding”) for certain internet transmissions by NPR, American Public Media, Public Radio International, Public Radio Exchange, and certain public radio stations (“Covered Entities”). The Parties are pleased to submit the attached proposed regulatory language (the “Settlement”) for publication in the *Federal Register* for notice and comment in accordance with 17 U.S.C. § 801(b)(7)(A) and 37 C.F.R. § 351.2(b)(2). The Parties respectfully request that the Judges promptly adopt the Settlement in its entirety as a settlement of rates and terms under Sections 112(e) and 114 of the Copyright Act for eligible transmissions made by Covered Entities through their websites, and related ephemeral recordings, as more specifically set forth in the Settlement. The Parties further request that the Judges endeavor to determine before the hearing in this Proceeding (set to begin on April 27, 2015) whether or not they will adopt the Settlement.

I. The Parties

SoundExchange and NPR both filed petitions to participate in this Proceeding.

SoundExchange is a nonprofit organization that is jointly controlled by representatives of both sound recording copyright owners and performers. SoundExchange has about 18,000 rights owner members and more than 40,000 artist members. The Copyright Royalty Judges have also designated SoundExchange as the collective to receive and distribute royalties under Sections 112(e) and 114 on behalf of all copyright owners and performers.

NPR is the leading membership and representation organization for public radio. It is a nonprofit membership corporation that produces and distributes noncommercial programming through public radio stations nationwide. NPR member stations are also significant producers of local, regional and national news content, as well as music and other specialized programming.

CPB is a private, nonprofit entity that was founded by Congress and is funded by the federal government. CPB is the largest single source of funding for public radio, television and related online and mobile services. CPB provides significant funding to Covered Entities and will pay all royalties under the Settlement.

II. Nature of the Settlement

Public radio consists of a unique set of entities, and has a unique history, organizational structure and funding model. Among other things, public radio receives substantial funding from CPB. Through CPB, the federal government has always paid sound recording royalties for public radio. As a result, public radio presents unique business, economic and political circumstances unlike other participants in this Proceeding or the marketplace.

Due to these unique circumstances, there is a long history of rate settlements between SoundExchange and NPR/CPB. The Settlement continues the structure of previous settlements

while increasing the payment to be made by CPB. Because the Settlement applies to only a closed group of licensees, and has only a single payor (CPB), the Settlement is being submitted to the Judges for adoption as a statutory rate and terms only so that it will be binding on all copyright owners and performers, including those that are not members of SoundExchange. *See* 17 U.S.C. § 114(f)(2)(B).

Previous settlements between SoundExchange and NPR/CPB have also provided for significant consolidated reporting of usage by Covered Entities through CPB in a manner that takes into account the unique organizational structure of public radio. The parties have separately agreed to continue their prior reporting arrangements with certain changes in detail. In view of the Judges' statements that SoundExchange and licensees may agree among themselves to vary the reporting requirements under applicable regulations,¹ and that the Judges do not wish to codify in the *Code of Federal Regulations* arrangements pertinent only to specific licensees,² the Parties have not included the details of their agreed-upon reporting arrangements in the Settlement submitted with this motion. However, the Judges should understand that, at least through 2020, the Parties have agreed upon reporting arrangements that address the concerns previously expressed by NPR in Docket No. 14-CRB-0005 RM.

¹ *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 74 Fed. Reg. 52,418, 52,419 (Oct. 13, 2009) ("digital audio services are free to negotiate other formats and technical standards for data maintenance and delivery and may use those in lieu of regulations adopted by the Judges, upon agreement with the Collective"); *Notice and Recordkeeping for Use of Sound Recordings Under Statutory License*, 71 Fed. Reg. 59,010, 59,012 (Oct. 6, 2006) ("copyright owners and services are always free to negotiate different format and delivery requirements that suit their particular needs and situations").

² 74 Fed. Reg. at 52,419 ("We have no intention of codifying these negotiated variances in the future unless and until they come into such standardized use as to effectively supersede the existing regulations.").

III. Prompt Adoption of the Settlement by the Copyright Royalty Judges

Pursuant to 17 U.S.C. § 801(b)(7)(A), the Copyright Royalty Judges have the authority “[t]o adopt as a basis for statutory terms and rates . . . an agreement concerning such matters reached among some or all of the participants in a proceeding at any time during the proceeding.” Such an agreement may serve as the basis of proposed regulations if other interested parties who “would be bound by the terms, rates or other determination” set by the agreement are afforded “an opportunity to comment on the agreement,” *id.* § 801(b)(7)(A)(i), and provided that, in the event a participant in the proceeding who would be bound by the settlement raises an objection, the Judges conclude that the rates and terms set forth in the settlement agreement “provide a reasonable basis for setting statutory terms or rates.” *Id.* § 801(b)(7)(A)(ii).

Encouraging settlements was a key goal of Congress when it adopted the current ratesetting procedures. H. Rep. No. 108-408, at 30 (Jan. 30, 2004) (“the Committee intends that the bill as reported will facilitate and encourage settlement agreements for determining royalty rates”). Congress desired that royalty rates and terms be established by settlement, rather than litigation, whenever possible, to “reduce[] the need to conduct full-fledged ratesetting . . . proceedings” and thus “generate savings while expediting the disposition of proceedings.” H. Rep. No. 108-408, at 24.

The hearing in this Proceeding is set to begin on April 27, 2015. Knowing by that time whether or not the Judges will adopt the Settlement not only will allow the Parties to conserve their resources, but also will streamline the hearing to the benefit of the Judges and the other participants. Accordingly, the Parties respectfully request that the Judges publish the Settlement for comment, and promptly adopt the Settlement in its entirety as the statutory rates and terms

for Eligible Transmissions by Covered Entities for the period 2016-2020. The Parties specifically request that the Judges endeavor to decide before the hearing in this Proceeding whether or not they will adopt the Settlement.

Dated: February 23, 2015

Respectfully submitted,

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ATTACHMENT
PROPOSED REGULATIONS

[Note: For convenience of reference, the Parties have styled these proposed regulations as a new Subpart D to appear at the end of 37 C.F.R. Part 380 and use section numbering similar to current Subparts A through C. These proposed regulations ultimately should be located wherever makes sense given the Judges' final determination in this proceeding, with the section references adjusted as necessary.]

Subpart D — Certain Transmissions by Public Broadcasting Entities

§380.30 — General.

§380.31 — Definitions.

§380.32 — Royalty fees for the public performance of sound recordings and for ephemeral recordings.

§380.33 — Terms for making payment of royalty fees and statements of account.

§380.34 — Confidential Information.

§380.35 — Verification of royalty payments.

§380.36 — Verification of royalty distributions.

§380.37 — Unclaimed funds.

Subpart D—Certain Transmissions by Public Broadcasting Entities

§380.30 — General.

(a) *Scope.* This subpart establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions, through Authorized Web Sites, by means of Web Site Performances, by certain Covered Entities as set forth in this subpart in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Covered Entities in accordance with the provisions of 17 U.S.C. 112(e) solely as necessary to encode Sound Recordings in different formats and at different bit rates as necessary to facilitate Web Site Performances, during the period January 1, 2016, through December 31, 2020. The provisions of this subpart shall apply to the Covered Entities in lieu of other rates and terms applicable under 17 U.S.C. 112(e) and 114.

(b) *Legal compliance.* Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114 shall comply with the requirements of those sections, the rates and terms of this subpart, and any other applicable regulations.

(c) *Relationship to voluntary agreements.* Notwithstanding the royalty rates and terms established in this subpart, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this subpart to transmission within the scope of such agreements.

§380.31 — Definitions.

For purposes of this subpart, the following definitions shall apply:

Aggregate Tuning Hours (ATH) means the total hours of programming that Covered Entities have transmitted during the relevant period to all listeners within the United States from all Covered Entities that provide audio programming consisting, in whole or in part, of Web Site Performances, less the actual running time of any sound recordings for which the Covered Entity has obtained direct licenses apart from this Agreement. By way of example, if a Covered Entity transmitted one hour of programming to ten (10) simultaneous listeners, the Covered Entity's Aggregate Tuning Hours would equal ten (10). If three (3) minutes of that hour consisted of transmission of a directly licensed recording, the Covered Entity's Aggregate Tuning Hours would equal nine (9) hours and thirty (30) minutes. As an additional example, if one listener listened to a Covered Entity for ten (10) hours (and none of the recordings transmitted during that time was directly licensed), the Covered Entity's Aggregate Tuning Hours would equal 10.

Authorized Web Site is any Web Site operated by or on behalf of any Covered Entity that is accessed by Web Site Users through a Uniform Resource Locator ("URL") owned by such Covered Entity and through which Web Site Performances are made by such Covered Entity.

CPB is the Corporation for Public Broadcasting.

Collective is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2016-2020 license period, the Collective is SoundExchange, Inc.

Copyright Owners are Sound Recording copyright owners who are entitled to royalty payments made under this subpart pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114(f).

Covered Entities are NPR, American Public Media, Public Radio International, and Public Radio Exchange, and up to 530 Originating Public Radio Stations as named by CPB. CPB shall notify SoundExchange annually of the eligible Originating Public Radio Stations to be considered Covered Entities hereunder (subject to the numerical limitations set forth herein). The number of Originating Public Radio Stations treated hereunder as Covered Entities shall not exceed 530 for a given year without SoundExchange's express written approval, except that CPB shall have the option to increase the number of Originating Public Radio Stations that may be considered Covered Entities as provided in section 380.32(c).

Ephemeral Phonorecords are Phonorecords of all or any portion of any Sound Recordings; provided that: (i) such Phonorecords are limited solely to those necessary to encode Sound Recordings in different formats and at different bit rates as necessary to facilitate Web Site Performances covered by this subpart; (ii) such Phonorecords are made in strict conformity with the provisions set forth in 17 U.S.C. 112(e)(1)(A)-(D); and (iii) the Covered Entities comply with 17 U.S.C. 112(a) and (e) and all of the terms and conditions of this Agreement.

Music ATH is ATH of Web Site Performances of Sound Recordings of musical works.

NPR is National Public Radio, Inc.

Originating Public Radio Station is a noncommercial terrestrial radio broadcast station that (i) is licensed as such by the Federal Communications Commission; (ii) originates programming and is not solely a repeater station; (iii) is a member or affiliate of NPR, American Public Media, Public Radio International, or Public Radio Exchange, a member of the National Federation of Community Broadcasters, or another public radio station that is qualified to receive funding from CPB pursuant to its criteria; (iv) qualifies as a “noncommercial webcaster” under 17 U.S.C. 114(f)(5)(E)(i); and (v) either (a) offers Web Site Performances only as part of the mission that entitles it to be exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501), or (b) in the case of a governmental entity (including a Native American Tribal governmental entity), is operated exclusively for public purposes.

Performers means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the individuals and entities identified in 17 U.S.C. 114(g)(2)(D).

Person is a natural person, a corporation, a limited liability company, a partnership, a trust, a joint venture, any governmental authority or any other entity or organization.

Phonorecords have the meaning set forth in 17 U.S.C. 101.

Qualified Auditor is a Certified Public Accountant, or a person, who by virtue of education or experience, is appropriately qualified to perform an audit to verify royalty payments related to performances of sound recordings.

Side Channel is any Internet-only program available on an Authorized Web Site or an archived program on such Authorized Web Site that, in either case, conforms to all applicable requirements under 17 U.S.C. 114.

Sound Recording has the meaning set forth in 17 U.S.C. 101.

Term is the period January 1, 2016, through December 31, 2020.

Web Site is a site located on the World Wide Web that can be located by a Web Site User through a principal URL.

Web Site Performances are all public performances by means of digital audio transmissions of Sound Recordings, including the transmission of any portion of any Sound Recording, made through an Authorized Web Site in accordance with all requirements of 17 U.S.C. 114, from servers used by a Covered Entity (provided that the Covered Entity controls the content of all materials transmitted by the server), or by a contractor authorized pursuant to Section 380.32(f), that consist of either (i) the retransmission of a Covered Entity’s over-the-air terrestrial radio programming or (ii) the digital transmission of nonsubscription Side Channels that are programmed and controlled by the Covered Entity. This term does not include digital audio transmissions made by any other means.

Web Site Users are all those who access or receive Web Site Performances or who access any Authorized Web Site.

§380.32 — Royalty fees for the public performance of sound recordings and for ephemeral recordings.

(a) *Royalty Rates.* The total license fee for all Web Site Performances by Covered Entities during the Term, up to a total Music ATH of 285,132,065 per calendar year, and Ephemeral Phonorecords made by Covered Entities solely to facilitate such Web Site Performances, during the Term shall be \$2,800,000 (the “License Fee”), unless additional payments are required as described in subsection (c).

(b) *Calculation of License Fee.* It is understood that the License Fee includes: (i) an annual minimum fee of \$500 for each Covered Entity for each year during the Term; (ii) additional usage fees for certain Covered Entities; and (iii) a discount that reflects the administrative convenience to the Collective of receiving annual lump sum payments that cover a large number of separate entities, as well as the protection from bad debt that arises from being paid in advance.

(c) *Increase in Covered Entities.* If the total number of Originating Public Radio Stations that wish to make Web Site Performances in any calendar year exceeds the number of such Originating Public Radio Stations considered Covered Entities in the relevant year, and the excess Originating Public Radio Stations do not wish to pay royalties for such Web Site Performances apart from this subpart, CPB may elect by written notice to the Collective to increase the number of Originating Public Radio Stations considered Covered Entities in the relevant year effective as of the date of the notice. To the extent of any such elections, CPB shall make an additional payment to the Collective for each calendar year or part thereof it elects to have an additional Originating Public Radio Station considered a Covered Entity, in the amount of \$500 per Originating Public Radio Station per year. Such payment shall accompany the notice electing to have an additional Originating Public Radio Station considered a Covered Entity.

(d) *Ephemeral recordings.* The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by Covered Entities solely to facilitate Web Site Performances for which royalties are paid pursuant to this subpart shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.

(e) *Effect of Non-Performance by Any Covered Entity.* In the event that any Covered Entity violates any of the material provisions of 17 U.S.C. 112(e) or 114 or this subpart that it is required to perform, the remedies of the Collective shall be specific to that Covered Entity only, and shall include, without limitation, termination of that Covered Entity’s right to be treated as a Covered Entity hereunder upon written notice to CPB. The Collective and Copyright Owners also shall have whatever rights may be available to them against that Covered Entity under applicable law. The Collective’s remedies for such a breach or failure by an individual Covered Entity shall not include termination of the rights of other Covered Entities to be treated as Covered Entities hereunder, except that if CPB fails to pay the License Fee or otherwise fails to

perform any of the material provisions of this subpart, or such a breach or failure by a Covered Entity results from CPB's inducement, and CPB does not cure such breach or failure within 30 days after receiving notice thereof from the Collective, then the Collective may terminate the right of all Covered Entities to be treated as Covered Entities hereunder upon written notice to CPB. In such a case, a prorated portion of the License Fee for the remainder Term (to the extent paid by CPB) shall, after deduction of any damages payable to the Collective by virtue of the breach or failure, be credited to statutory royalty obligations of Covered Entities to the Collective for the Term as specified by CPB.

(f) *Use of Contractors.* The right to rely on this subpart is limited to Covered Entities, except that a Covered Entity may employ the services of a third Person to provide the technical services and equipment necessary to deliver Web Site Performances on behalf of such Covered Entity, but only through an Authorized Web Site. Any agreement between a Covered Entity and any third Person for such services shall (i) obligate such third Person to provide all such services in accordance with all applicable provisions of the statutory licenses and this subpart; (ii) specify that such third Person shall have no right to make Web Site Performances or any other performances or Phonorecords on its own behalf or on behalf of any Person or entity other than a Covered Entity through the Covered Entity's Authorized Web Site by virtue of its services for the Covered Entity, including in the case of Phonorecords, pre-encoding or otherwise establishing a library of Sound Recordings that it offers to a Covered Entity or others for purposes of making performances, but instead must obtain all necessary licenses from the Collective, the copyright owner or another duly authorized Person, as the case may be; (iii) specify that such third Person shall have no right to grant any sublicenses under the statutory licenses; and (iv) provide that the Collective is an intended third-party beneficiary of all such obligations with the right to enforce a breach thereof against such third Person.

§380.33 — Terms for making payment of royalty fees and statements of account.

(a) *Payment to the Collective.* CPB shall pay the License Fee to the Collective in five equal installments of \$560,000 each, which shall be due December 31, 2015 and annually thereafter through December 31, 2019.

(b) *Designation of the Collective.* (1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments for Covered Entities under this subpart and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. 112(e) or 114(g).

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in this paragraph (b)(2), such representatives shall file a petition with the Copyright Royalty

Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized the Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) *Reporting.* CPB and Covered Entities shall submit reports of use and other information concerning Web Site Performances as agreed upon with the Collective.

(d) *Late Payments and Statements of Account.* A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account received by the Collective after the due date. Late fees shall accrue from the due date until payment and the related statement of account are received by the Collective.

(e) *Distribution of royalties.* (1) The Collective shall promptly distribute royalties received from CPB to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all Web Site Performances by Covered Entities equally based upon the reporting information provided by CPB/NPR.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (e)(1) of the section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with §380.37.

(f) *Retention of Records.* Books and records of CPB and Covered Entities and of the Collective relating to payments of and distributions of royalties shall be kept for a period of not less than the prior 3 calendar years.

§380.34 — Confidential Information.

(a) *Definition.* For purposes of this subpart, “Confidential Information” shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge, or documents or information that become publicly known through no fault of the Collective or are known by the Collective when disclosed by CPB/NPR. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto and enforcement of the terms of the statutory licenses.

(d) *Disclosure of Confidential Information.* Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to §380.35 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to §380.36;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. 112(e) and 114 by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. 112(e) and 114 before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts, subject to the provisions of any relevant agreements restricting the activities of CPB, Covered Entities or the Collective in such proceedings.

(e) *Safeguarding of Confidential Information.* The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

§380.35 — Verification of royalty payments.

(a) *General.* This section prescribes procedures by which the Collective may verify the royalty payments made by CPB.

(b) *Frequency of verification.* The Collective may conduct a single audit of any Covered Entities, upon reasonable notice and during reasonable business hours, during any given calendar year, for

any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of intent to audit.* The Collective must file with the Copyright Royalty Judges a notice of intent to audit CPB and Covered Entities, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on CPB. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) *Acquisition and retention of report.* CPB and Covered Entities shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of not less than 3 years.

(e) *Consultation.* Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of CPB in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of CPB reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(f) *Costs of the verification procedure.* The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case CPB shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§380.36 — Verification of royalty distributions.

(a) *General.* This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) *Frequency of Verification.* A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) *Notice of Intent to Audit.* A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) *Acquisition and Retention of Report.* The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) *Consultation.* Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(f) *Costs of the Verification Procedure.* The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

§380.37 — Unclaimed funds.

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this subpart, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2015, I caused a copy of **JOINT MOTION TO ADOPT PARTIAL SETTLEMENT** to be served via electronic mail and first-class, postage prepaid, United States mail, to the Participants as indicated below:

Participants

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<p>Antonio E. Lewis King & Spalding, LLP 100 N. Tryon Street, Suite 3900 Charlotte, NC 28202 Tel: 704-503-2583 Fax: 704-503-2622 E-Mail: alewis@kslaw.com <i>Counsel for National Public Radio, Inc. (NPR)</i></p>	<p>David Golden CONSTANTINE CANNON LLP 1001 Pennsylvania Ave. NW, Suite 1300N Washington, DC 20004 dgolden@constantinecannon.com Telephone: (202) 204-3500 Facsimile: (202) 204-3501 <i>Counsel for College Broadcasters Inc. (CBI)</i></p>


Karen Easton

NRBNMILC

Ex. 23

This exhibit is Restricted in its entirety and is therefore omitted from the public version of this filing.

NRBNMLC

Ex. 24

This exhibit is Restricted in its entirety and is therefore omitted from the public version of this filing.

Proof of Delivery

I hereby certify that on Tuesday, January 14, 2020, I provided a true and correct copy of the NRBNMLC Written Rebuttal Statement (PUBLIC) to the following:

Pandora Media, LLC, represented by Jessica L Falk, served via Electronic Service at jessica.falk@weil.com

circle god network inc d/b/a david powell, represented by david powell, served via Electronic Service at davidpowell008@yahoo.com

Radio Paradise Inc., represented by David Oxenford, served via Electronic Service at doxenford@wbklaw.com

Sirius XM Radio Inc., represented by Jessica L Falk, served via Electronic Service at jessica.falk@weil.com

National Public Radio, Inc., represented by Gregory A Lewis, served via Electronic Service at glewis@npr.org

UMG Recordings, Inc., represented by Alex S. Trepp, served via Electronic Service at atrepp@jenner.com

American Association of Independent Music ("A2IM"), The, represented by Alex S. Trepp, served via Electronic Service at atrepp@jenner.com

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Warner Music Group Corp., represented by Alex S. Trepp, served via Electronic Service at
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American Federation of Musicians of the United States and Canada, The, represented by
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Signed: /s/ Karyn K Ablin